In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1180

ADAMS POTATO CHIPS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3–A13) is reported at 430 F. 2d 90. The Board's decision and order (Pet. App. A13–A25) are reported at 176 NLRB No. 16.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1970. On November 4, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including December 30, 1970 (Pet. App. A25), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

414-975—71

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company and Union had reached a full and final bargaining contract which the Company then refused to execute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. A1–A2.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 20, 1967, after having won a Board-conducted election, the Union[1] was certified by the Board as the bargaining representative of the Company's eight driver-salesmen (Pet. App. A14; R. 122–123).[2] Bargaining commenced in November 1967. The Union was represented by Secretary-Treasurer Lloyd McKim, and several of the driver-salesmen were also in attendance; the Company was represented throughout the negotiations by its attorney, Donald F. Strutz, and by sales and advertising Department Manager Eugene Cawvey. (Pet. App. A15; R. 62–63, 74, 113.) At the outset of the bargaining, Union Representative McKim stated that any agreement reached during negotiations would be tentative, subject to approval of the bargaining unit employees. Company negotiator

---

[1] Local 580, International Brotherhood, of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] "R." references are to the joint appendix to the briefs in the court below.

Strutz similarly announced that agreements reached at the bargaining table would be subject to the approval of Company President Charles Seyfert. (Pet. App. A15; R. 24, 63, 76, 93–94.)

1. THE NEGOTIATIONS PRIOR TO AUGUST 27, 1968

The parties met on more than ten occasions over the next six months, and finally worked out the terms of a tentative agreement. President Seyfert approved the agreement, but the driver-salesmen voted unanimously to reject it. (Pet. App. A15; R. 25–26, 71, 114.) Thereafter, the parties met on several occasions but the Company refused to agree to any changes in its prior proposals (Pet. App. A16; R. 72, 114).[3] On July 30, 1968, Company negotiators Strutz and Cawvey met with the employees, at McKim's request, in an effort to explain the route-cutting provisions of the proposed contract. That evening, the employees again voted unanimously to reject the contract. (Pet. App. A16; R. 72, 114–115.)

2. THE AUGUST 27 MEETING

On August 27, the parties met again to continue negotiations. McKim was accompanied by six of the eight driver-salesmen. (Pet. App. A16; R. 104, 105, 114–115.) He opened the meeting by presenting Strutz with written contract proposals identical to those previously offered by the Company, and asked if this contract offer, approved by Seyfert, was "still in effect."

[3] The Union asked the Company to reconsider its proposals respecting overages and shortages, and the cutting of driver-salesmen's routes (Pet. App. A16; R. 72, 114).

Strutz assured him that it was. (Pet. App. A16; R. 66–67, 105, 115.) McKim again asked for changes with respect to overages and shortages, and proposed that the duration of the contract be reduced from three to two years. Strutz rejected both proposals. (Pet. App. A15; R. 67–68, 116.) McKim then asked if the Company would grant the driver-salesmen a three-week vacation after ten years' service, instead of the current proposal of fifteen years' service, since this was what the inside employees had been receiving (Pet. App. A15, A17–A18; R. 67, 84–85, 115).[4] Strutz replied, "We wondered why you didn't ask" for this before and "I think we can give you that without any question, because it is company policy and all of the rest of the employees get it" (Pet. App. A15, A17–A18; R. 60, 67, 115–116; see also R. 84–85, 101). McKim asked Strutz if he would "have to check that with Mr. Seyfert," and Strutz replied, "no this is company policy and we can get along with that" (Pet. App. A15, A17–A18; R. 67, 84–85).

Shortly thereafter, McKim asked Strutz and Cawvey to leave the room, and the employees voted, 4–2, to accept the Company's proposed contract with the three-weeks-after-ten-years provision(Pet. App. A15, A18; R. 69). When Cawvey and Strutz returned, McKim stated, "You have got a contract," and requested that the agreement including the vacation clause be executed as soon as possible (Pet. App. A16; R. 70, 116). Strutz refused, asserting for the first

[4] On the night before the August 27 meeting, McKim learned that the in-plant employees were receiving a three-week vacation after ten years' service (Pet. App. A15; R. 67).

time that the Union had lost its majority status, and that a petition for a decertification election had been filed (Pet. App. A16, A18–A19; R. 70, 87, 116).[5] The meeting thereupon ended (R. 116).

B. THE DECISIONS BELOW

The Board, adopting the Trial Examiner's findings, found that, on August 27, 1968, the parties had reached agreement on a complete contract, including the change in the vacation clause, and that the Company then refused to execute and give effect to that contract (Pet. App. A18, A24).[6] The Board concluded that, by thus refusing to sign the contract and by thereafter refusing to recognize the Union as the certified bargaining representative of its employees,

---

[5] On July 18, 1968, the Company filed a petition with the Board's Regional Director seeking to decertify the Union as the bargaining representative. The Director dismissed the petition on July 29, relying upon the settled rule that, during the first year of a union's certification, its majority status is irrebuttably presumed and cannot be attacked in a decertification proceeding (Pet. App. A16; R. 128–129). At the time of the August 27 meeting, the Union's "certification year" still had almost a month to run.

[6] The Trial Examiner credited McKim's testimony (R. 67, 70), which was corroborated by employee Bretz (R. 85, 87), that Strutz said the vacation change was acceptable without obtaining Seyfert's approval (Pet. App. A17–A18). In accepting McKim's version rather than the contrary testimony of Strutz and others (R. 100, 106–107, 116), the Examiner relied, *inter alia*, on (1) the uncontradicted evidence that the vacation change conformed to existing policy with respect to inside employees; and (2) the fact that Strutz never stated that the vacation clause was the reason for rejecting the agreement, which had otherwise been previously approved by President Seyfert (Pet. App. 18).

the Company violated Section 8(a)(5) and (1) of the Act (Pet. App. A18–A20). The Board ordered the Company to cease and desist from the unfair labor practices found; to recognize and bargain with the Union upon request; to "execute, sign, and maintain in effect all the terms and conditions of the contract agreed upon by the parties on August 27, 1969"; to make the employees whole for any loss of benefits suffered by reason of the Company's nonobservance of the contract; and to post the usual compliance notice (Pet. App. A21–A23).

The court of appeals, Judge Weick dissenting in part, sustained the Board's findings and conclusions, and enforced its order (Pet. App. A3–A13). The court held that the Board's finding that the Company had agreed to the vacation change proffered by the Union "is supported by testimony that appears in the record"; "[w]e cannot say that it is insubstantial when viewed on the record as a whole" (Pet. App. A9).[1]

ARGUMENT

Petitioner's basic contention is that the order of the court below conflicts with *H. K. Porter* v. *National*

---

[1] While agreeing that the Company had bargained in bad faith, Judge Weick would not have required the Company to execute the contract since, in his view, there was insufficient evidence to show that Stratz had authority to complete the contract of August 27 without obtaining Seyfert's ratification (Pet. App. A11–A13). Judge McAllister, a member of the panel majority, responded, in a concurring opinion, that, even assuming that Stratz's authority was limited, Seyfert ratified the change agreed to by him by failing to repudiate it "either subsequent to the negotiations or as soon thereafter as he had heard of it, or at any time during this protracted proceedings * * *" (Pet. App. A9–A10).

Labor Relations Board, 337 U.S. 99, because it requires the Company to accept a substantive contract provision which was not agreed to in collective bargaining. That issue is not presented here. The Board found that the Company refused to execute a contract whose terms had in fact been agreed to by both parties. See *H. J. Heinz* v. *National Labor Relations Board*, 311 U.S. 514. Accordingly, the only issue presented is whether the court of appeals properly concluded that there was substantial evidence to support the Board's finding. Such an evidentiary issue does not warrant further review by this Court. In any event, the record adequately supports the Board's finding (see notes 6 and 7, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
HERBERT FINEGOLD,
Attorney,
National Labor Relations Board.

JANUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971